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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-749

LAWRENCE N. ADLER, Petitioner

V.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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OF WESTERN PENNSYLVANIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Petitioner, Lawrence N. Adler, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Pennsylvania Supreme Court entered in this proceeding on July 2, 1973.

OPINIONS BELOW

The majority and the dissenting opinions of the Pennsylvania Supreme Court, review of which are sought in this Court, are reported at 453 Pa. 60 (1973). They are set forth at pages 1-a - 21-a of the separately bound Appendix. Other orders and opinions in this litigation are also set forth in the separately bound Appendix as follows:

1. Order of the Court of Common Pleas of Allegheny County, Pennsylvania dated May 28, 1970 denying a preliminary injunction (Appendix 31-a).

2. Adjudication and Decree Nisi of the Court of Common Pleas of Allegheny County, Pennsylvania dated September 13, 1971 (Appendix 32-a).

3. Opinion and Final Decree of the Court of Common Pleas of Allegheny County, Pennsylvania dated December 10, 1971 (Appendix 70-a).

4. Order of the Supreme Court of the Commonwealth of Pennsylvania denying a Petition for Reargument dated August 13, 1973 (Appendix 22-a).

JURISDICTION

The order and opinion of the Pennsylvania Supreme Court was entered on July 2, 1973. A timely Petition for Reargument was filed on July 11, 1973, and was denied on August 13, 1973 (Appendix 22-a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fourteenth Amendment may a public hospital deny to a qualified nonsalaried physician on its medical staff the right to perform delicate medical procedures on patients who desire to have such procedures performed by that physician, without a hearing, based solely on a hospital rule which prohibits anyone other than salaried physicians from performing such medical procedures?

2. Under the Equal Protection Clause of the Fourteenth Amendment may a public hospital enforce a rule that only salaried physicians are entitled to perform certain delicate medical procedures when that rule has the effect of denying a qualified nonsalaried physician on the medical staff the privilege of performing such procedures when under hospital policy many other nonsalaried physicians continue to be permitted to perform other delicate medical procedures for their patients?

3. Are patients denied rights protected by the Due Process Clause of the Fourteenth Amendment if they are forced by a public hospital to receive treatment involving risks to their life or health from a physician employed by the hospital where such patients wish to have other qualified nonsalaried physicians on the hospital staff perform such procedures?

4. Are regulations affecting important rights such as those involved in the physician-patient relationship subject to closer judicial scrutiny under the Due Process or Equal Protection Clauses of the Fourteenth Amendment where such regulations are enacted or enforced by private parties who are not publicly elected or appointed although they are charged with the administration of public programs?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. Factual Background

The Petitioner, Lawrence N. Adler, seeks to perform delicate cardiac procedures in the Cardiovascular Laboratory of the Respondent, Montefiore Hospital of Pittsburgh Pennsylvania.* The Respondent Hospital has to date, without giving Petitioner any hearing, prevented him from performing medical procedures for Petitioner's patients in the Hospital's facilities.

While a voluminous record was created in the courts below, the relevant facts for present purposes were basically established by the pleadings and by the stipulation of facts filed by the parties (Appendix 81-a et seq.).

First, the record is clear with respect to Petitioner's qualifications. Following graduation from medical school in 1957, Petitioner served his required internship followed by a two-year residency in internal medicine. He next served a one-year residency in cardiology at Mt. Sinai Hospital in New York City and was then appointed Fellow for two years at the Thorndike Memorial Laboratory of Harvard University Medical School located in the Boston City Hospital. Dr. Adler, thus, received full training in the performance of such procedures as cardiac catheterization, coronary arteriography and the installation of pacemakers. He has published numerous medical articles and is the inventor of a special needle used in left heart catheterizations. He is board certified in internal medicine by the American Board of Internal Medicine, and he is also certified in the sub-specialty of cardiovascular diseases. He serves as a

*Montefiore Hospital is owned and managed by the Montefiore Hospital Association of Western Pennsylvania, the named Respondent in these proceedings.

Fellow in the American College of Cardiology, is active in the American Heart Association and was, at the time of the final hearing in the Court of Common Pleas, president-elect of the Western Pennsylvania Heart Association. The Respondent Hospital has stipulated that the Petitioner is experienced in performing all of the procedures which he seeks the right to perform through this lawsuit and that he is fully qualified to perform all such procedures (Appendix 101-a).

Second, with respect to Petitioner's affiliation with Respondent Hospital, the record shows that Dr. Adler has been on the hospital staff from July, 1963 down to the present. Indeed, prior to July, 1969 Dr. Adler had established the Cardiovascular Laboratory at the Respondent Hospital and had served as the part-time salaried director of that laboratory.

In July of 1969 the Hospital hired a full-time salaried director for the Cardiovascular Laboratory and relieved Dr. Adler of his duties in connection with this laboratory. At that time the Hospital refused to permit Dr. Adler to perform any procedures on patients in the Cardiovascular Laboratory based on a rule that only the full-time salaried director should be permitted to perform these procedures. Dr. Adler attempted, through Hospital channels, to have the policy reversed so as to permit him to treat his patients. When the Hospital denied his request for a hearing with respect to its decision refusing to grant him privileges in the Cardiovascular Laboratory, the present lawsuit was commenced.

Third, the record shows that the Respondent Hospital is a large, highly respected community hospital which is affiliated with the Medical School of the University of Pittsburgh. As a modern hospital affiliated with a large university medical center the Respondent has developed numerous sophisticated and specialized laboratories for the performance of a wide range of

procedures and tests. The public nature of the Hospital and its governmental involvement are detailed more fully in the third part of this statement.

With respect to the Hospital rule involved in this case, it is necessary to explore the nature of the procedures which the Petitioner desires to perform. While they serve different purposes and are performed for different reasons, cardiac catheterization, coronary arteriography and the installation of pacemakers all require making an incision in the body and require that a blood vessel be entered. In all of these procedures a catheter is inserted into the blood vessel and is threaded into either the chambers of the heart or into the blood vessels feeding the heart. These intimate procedures are all performed by physicians and the performance of these procedures involves grave risks to the patient.

In justifying a rule which excludes a nonsalaried physician from performing these procedures, the Hospital has pointed to other facilities in the Hospital where only full-time physicians are involved in the performance of tests. Thus in a number of specialty laboratories, in radiology and in the reading of electrocardiograms, full-time salaried physicians are involved usually to the exclusion of private practitioners.* In all of these situations, however, the physician is either supervising technicians in performing tests or the physician is reviewing an x-ray film or electrocardiogram actually taken by a technician. The physician is not directly treating a patient or performing procedures involving risk to the patient.

*In radiology while the physicians are full-time, they are not salaried by the Hospital but rather belong to a professional group. Also the Director of Radiology does permit private practitioners to perform procedures in that department.

While most of the twenty-five salaried physicians employed by the Hospital are engaged either in teaching or in supervising laboratory personnel, some salaried physicians do practice in the clinical departments of the Hospital. In these areas, including perhaps most importantly surgery, despite the presence of salaried physicians, the private physicians on the staff continue to have full privileges to perform all of the medical procedures which they had performed in the past.

Thus there exists a profound distinction between the intimate procedures which Petitioner seeks to perform on his patients and other procedures conducted in the laboratories of the Hospital. Similarly Petitioner has been denied access to perform surgical type procedures in the cardiology unit while other private physicians may perform surgery in other areas of the Hospital.

Unfortunately when the Petitioner endeavored to obtain a hearing within the Hospital to explore these factors, his request to be heard was summarily denied.

2. Proceedings in the Courts Below

Following the refusal of the Respondent Hospital to grant Petitioner a hearing before its Joint Conference Committee with respect to Petitioner's request to perform procedures in the Cardiovascular Laboratory, Petitioner commenced an action in equity in the Court of Common Pleas of Allegheny County, Pennsylvania seeking to enjoin the enforcement of the Hospital's exclusionary policy. In his complaint Petitioner brought suit on his own behalf, on behalf of his patients and on behalf of other physicians who wish to refer patients to the Petitioner for treatment (Appendix 84-a, 87-a). Petitioner showed in the lower courts that numerous patients who had sought to be treated by him had to be referred elsewhere (Appendix 106-a).

In addition, he introduced the affidavits of fellow physicians who stated that they desired to be able to refer patients to Dr. Adler for cardiac catheterization, coronary arteriography and the installation of pacemakers.

On May 28, 1970 the Court of Common Pleas of Allegheny County, Pennsylvania denied Petitioner's request for preliminary injunctive relief (Appendix 31-a). A final hearing was held in the Court of Common Pleas of Allegheny County in March, 1971 and following the filing of briefs and argument the chancellor filed his adjudication and entered a Decree Nisi denying Petitioner's request for relief (Appendix 32-a). Timely exceptions to the Decree Nisi were filed and on December 10, 1971 a court *en banc* of the Court of Common Pleas of Allegheny County, Pennsylvania filed its opinion and entered a final order denying Petitioner's request for relief (Appendix 70-a). A direct appeal was taken to the Supreme Court of the Commonwealth of Pennsylvania.

3. How Federal Question Was Raised

Petitioner raised the federal questions which are presented in this petition in Count II of the complaint which was filed in the Court of Common Pleas of Allegheny County. In paragraphs 28, 29, 30 and 31 of the Complaint Petitioner set forth the extensive state regulation, licensing and support of the Respondent Hospital (Appendix 86-a - 87-a). In its answer the Respondent admitted that it was a public institution and that its conduct and action would be "state action" (Appendix 95-a). Further, in the stipulation of facts, based on the admissions in the pleadings and on discovery undertaken during the lawsuit, the Respondent Hospital conceded that, by reason of its affiliation with a state related university, its financial support from the Commonwealth of Pennsylvania and the federal government under various programs, it was a public institution and

that its actions were "state actions" within the scope of the Fourteenth Amendment (Appendix 99-a - 100-a). While other non-federal reasons were advanced in support of Petitioner's request for injunctive relief, both the Court of Common Pleas of Allegheny County and the Pennsylvania Supreme Court expressly passed on the federal constitutional questions raised by the Petitioner. It is to review the lower courts' decision that the Fourteenth Amendment does not invalidate the action of the Respondent Hospital that this petition is presented.

REASONS FOR GRANTING THE WRIT

Providing adequate health care to the citizenry of this country has become a major governmental responsibility. Federal and state funding of health care programs have increased enormously. Increasing regulation and governmental review of all areas of the health care industry are evident. Moreover Congress is considering proposals from leaders from both major political parties for additional programs to meet the expenses of providing needed medical services. An extensive discussion of the history of governmental medical programs and a discussion of proposed new legislation is found in Havinghurst, "Symposium on the National Health Care Program," 35 *Law and Contemporary Problems* 229 (1970). The extent of governmental involvement in financing health care is documented in STAFF OF THE COMMITTEE ON WAYS AND MEANS, 92nd CONG. 1st SESS., BASIC FACTS ON THE HEALTH INDUSTRY, (COMM. PRINT 1971) and in U.S. DEPT. H.E.W., SOCIAL SECURITY ADMIN., COMPENDIUM OF NATIONAL HEALTH EXPENDITURES DATA (1973).

Not only has the level of local, state and federal support and control of the health care industry increased, but also the basic structure of health care delivery has been rapidly evolving.

Fifty years ago the primary health care provider was the individual physician who treated patients either in their homes or at the office. Hospitals were, within this overall picture, relatively unimportant. Today, on the other hand, hospitals and clinics are the primary health care providers. Thus access to the hospital is vital for both patients and physicians.

This case raises important questions which this Court has not had occasion to rule upon involving the rights of individuals who are confronted by the primary institution of our governmentally sponsored health care industry, namely, the modern public hospital. This petition seeks review of a case involving the rights of those who seek to practice the healing arts in our modern public hospital and the corollary rights of those who come to our hospitals seeking to be cured.

1. The rights of physicians who practice medicine in our governmentally supported or sponsored hospitals need to be clarified. The courts below concluded that the rights involved are not fundamental rights. In effect the rights were treated like economic rights or rights under social welfare programs which are broadly subject to state regulation.

Two prior opinions of this Court have touched on issues raised by the present case. In *Hayman v. Galveston*, 273 U.S. 414 (1927), this Court held that an osteopath did not have a protected right under the Fourteenth Amendment to practice on the staff of a public hospital. Later in *Barsky v. Board of Regents*, 347 U.S. 442 (1954), the majority opinion of this Court stated that the practice of medicine was a privilege granted by the state which possessed "plenary power to fix the terms of admission." 347 U.S. at 451.

The realities of modern hospital organization indicate that the application of these two cases to a physician's right to

practice in today's society needs to be reconsidered. The *Hayman* case, decided in an era when hospital practice was less important to a physician and involving, as it did, an osteopathic physician in an era when substantial differences existed between osteopathy and medical practice, is an uncertain guide in determining a physician's right to practice in modern public hospitals. Likewise the *Barsky* opinion, coming during the time when it was written, seems to unduly narrow the protection which should be afforded to a person's interest in practicing medicine.

Not only must the prior opinions of this Court be reconsidered in today's light but also it is important to review the opinion of the court below since it failed to grasp the fundamental nature of the physician's right to practice his profession. First, the right of one to follow any of the ordinary occupations of life has been held to be a fundamental right deserving of the full protection of the Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923). Thus to permit a physician's right to pursue his calling to be infringed without close judicial scrutiny of the circumstances surrounding the infringement will weaken the protection which ought to be given to every person's fundamental right to pursue a chosen calling. Second, long before our Constitution was written the common law courts of England had recognized that physicians should be free from unwarranted interference with their practice in the patient's interests. Thus as early as *Dr. Bonham's Case*, 8 Co. Rep. 114a, 2 Brownlee 255, 77 Eng. Rep. 647 (C.B. 1610), the English law had recognized that the right of a physician to practice was entitled to protection if his patients were to be afforded the opportunity to be treated by the person of their choice. In explaining the purpose behind a statutory provision permitting a physician who was not licensed in the City of London to attend patients for a period of a month without obtaining a license. Lord Coke stated:

> "... gentlemen, and others, come upon divers occasions to London, and when they are here become subject to diseases, and thereupon they send for their physicians in the country, who know their bodies, and the cause of their diseases; *now it was never the meaning of the act to bar any one of his own physicians*." 8 Co. Rep. at 117b (Emphasis supplied.)

The majority of the Pennsylvania Supreme Court expressly failed to recognize that the right of a physician to practice medicine was a fundamental right deserving of protection both for the sake of the physician and the patient. This approach seems to be in direct conflict with the nature of the review which this Court undertook in the recent abortion cases which involved related issues. It is respectfully submitted that the type of review which this Court undertook with respect to legislation which interfered with physicians' and patients' rights in *Doe v. Bolton*, 410 U.S. 179 (1973), ought to be required in any situation where a physician's right to practice in a hospital and the correlative right of the physician's patient to be treated is infringed.

2. Not only is it important for this Court to examine the fundamental nature of the right of a physician to practice his profession but it is equally important to set limits on the practices and procedures which may be followed by public hospitals in balancing the competing claims of patients and physicians. In the present case the Hospital has chosen to adopt a rule which bars some physicians but not others from treating their patients without regard to either the patient's views or the physician's qualification to perform the procedures. In the present case the justification seems to center on the alleged requirements of a teaching program. There is, however, no showing that the Hospital considered any other alternatives to the

adoption of a unilateral rule which had the effect of creating an irrebutable presumption that nonsalaried physicians cannot perform medical procedures on their patients. It is respectfully suggested that the procedures followed by the Respondent Hospital in this case violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. If a physician's right to practice is to be infringed it is respectfully submitted that this should be done only following a fair and reasonable procedure which balances the interest requiring regulation with the physicians and the patient's interest in permitting the physician to continue to perform procedures. Regulations, if required, should be narrowly drawn to serve only the reasonable purposes for which they are created and some procedure for individualized hearing should be evolved. This appears to be the clear teaching of *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Vlandis v. Kline*,___U.S.___, 93 S.Ct. 2230 (1973). Petitioner would respectfully urge that the principles enunciated in those cases are applicable to modern public hospitals and that the decision of the court below conflicts with the opinions of this Court.

Finally, situations like the present one where private surgeons on the staff of the Respondent Hospital are permitted to perform procedures on their patients while private cardiologists are denied the right to treat their patients ought to be avoided in the interest of treating all people equally under the law. For a public institution to permit non-essential or accidental differences to affect important rights is inappropriate. The patient who requires heart surgery might have free choice as to who is to perform the surgery while the patient who needs a pacemaker would have no such freedom of choice. Likewise the physician who has trained to do delicate neurosurgery continues to be free to utilize his or her talents to the fullest while the person who has spent years training to perform cardiac

catheterization is denied the opportunity to utilize his or her highly developed skills.

3. In our society we have endeavored to recognize that the truly crucial personal decisions affecting one's life fall within an area of privacy into which the law ought not intrude. As our society grows more complex and, particularly as our modern hospitals become more sophisticated and specialized, it becomes important that fundamental rights not be lost sight of in the name of progress or efficiency. In modern medicine life is prolonged by means which were not deemed possible in an earlier era. Organs are transplanted from one person to another. Mechanical replacements for natural organs have been developed. Highly risky and, indeed, experimental surgery has worked wonders. The right, however, of the individual patient to make the ultimate decisions with respect to his or her life has caused enormous problems to our courts in the setting of today's modern hospital. See, for example, the several opinions of the United States Court of Appeals for the District of Columbia Circuit in denying a petition for rehearing by the court *en banc* in *Application of the President and Directors of Georgetown College Inc.*, 331 F.2d 1610 (D.C. Cir. 1964).

Petitioner would urge that this Court ought to review the decision of the court below both because of the importance of the rights of persons to dictate what is to happen to their life in a public hospital setting but also because the opinion of the lower court would appear to be in conflict with recent decisions of this Court. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) and in *Doe v. Bolton*, 410 U.S. 179 (1973), this Court recognized that a physician due to his relationship with his patients had standing to raise questions concerning the impact of the Respondent's conduct on clear and vital rights of its patients.

4. The growth of local, state and federal support for the health care industry is not unique. Governmental support in financing of numerous programs affecting the welfare of the citizenry has grown rapidly. In many instances the government has chosen to pursue programs designed to enhance the public health, safety or welfare by permitting essentially private bodies to administer these public programs. While a number of commentators have suggested that governmental policy making authority should never be given to private parties, see, e.g. Reich, "The New Property," 73 Yale L.J. 733 at 783 (1964), it is not necessary to consider that issue in this case. However, where private agencies do pursue governmental programs which affect important rights of the public, unless our courts subject the actions of such agencies to close judicial scrutiny, there is no way in which the public can be protected against the arbitrary abuse of governmental power. Since the court below by relying on cases like *McGowan v. Maryland*, 366 U.S. 420 (1960), chose to treat the regulation of the Respondent Hospital as being legally the equivalent of a statute enacted by a duly elected legislature, it refused to make inquiry into the factual basis for the Hospital's rule or into the procedure followed by the Hospital. The effect of this approach will be to permit the growth of private guilds enjoying governmental power and functioning without any effective mechanism to protect the citizens who must deal with such private agencies. See GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS, 105-151 (1968). In view of the proliferation of government programs which are implemented and administered by private agencies it is respectfully submitted that this Court ought to consider the proper role of the judiciary in examining rules and regulations of such private agencies performing governmental functions where the actions of such agencies impinge upon important and basic rights of our citizens.

In summary, a rule made by the director of medicine and acquiesced in by the board of a public hospital has deprived Petitioner and Petitioner's patients of vital and important personal rights. If the opinion of the court below is permitted to stand it will not merely deprive the Petitioner and his patients of their rights but, due to an erroneous reading of requirements of the Fourteenth Amendment, the rights of all physicians and patients in the Commonwealth of Pennsylvania will be seriously undermined. Perhaps more importantly, if the Court does not grant review of this case, physicians, patients and public hospitals throughout the country will be without guidance as to the protection which our Constitution affords to people in our modern public hospitals.

CONCLUSION

For the reasons stated, this writ should be granted and the decision of the Supreme Court of the Commonwealth of Pennsylvania should be reversed.

Respectfully submitted,

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